No. 6859.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

United States of America,
Appellant,

vs.

Ronald Baxter,
Appellee.

BRIEF OF APPELLANT.

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INDEX.

AUTHORITIES CITED.

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STATEMENT OF CASE.

Plaintiff sued and was given judgment on a War Risk Insurance contract. From this judgment defendant, United States of America, has appealed.

According to the evidence plaintiff received a shrapnel wound during the world war in the lower lumbar and ilium region. That as a result of this wound many of the heavy muscles of the back were removed but that otherwise it was completely healed. The Veterans' Bureau rated the plaintiff 30% disabled for compensation purposes.

Plaintiff testified that after his discharge from the Army he attempted to do certain work requiring the handling of heavy boxes which he was unable to do be-

cause of the weakened condition of his back. He also had a job as night watchman for a short time. He then went into vocational training under the Veterans' Bureau where he took a course in agriculture for two semesters and then was given a music course for two or three years. After this he was given further training in a business course and a salesmanship course.

He then testified that he did not give the progress the Bureau required and was taken out of training for that reason. Further that he was extremely nervous.

In 1924 he entered the Soldiers Home at Sawtelle, California, where he has lived, with the exception of short intervals, ever since. Right after going to the Soldiers Home he went to work as an elevator operator, for which he received $24.00 per month in addition to the board and room ordinarily supplied to the inmates. With the exception of short intervals he was so employed, with two or three increases in pay, until at the time of the suit he was employed as a sergeant for which he received the sum of $40.00 per month.

Plaintiff's only expert testimony was a doctor who qualified as a specialist in mental and nervous diseases, specifically stating that he was not a bone specialist. He testified that in his opinion the plaintiff was totally and permanently disabled because the concussion of the shrapnel wound in plaintiff's back had caused a disturbance in the spinal cord of the plaintiff which made him so nervous he could not work, but that any work he could do would be beneficial.

Defendant's case consisted of medical testimony that plaintiff was injured, as heretofore stated, but that the

injury, while permanent, was not total and that the plaintiff was perfectly able to do any work which did not require heavy exertion of the back muscles.

Defendant then established that plaintiff was employed at the Soldiers Home from October 8, 1924, with the exception of short intervals, until the time of trial and still is so employed; that his pay began at $24.00 per month and was increased at various times until the time of his trial he was receiving $40.00 per month in addition to the usual board, room, etc. supplied to the inmates of the Home.

Plaintiff's complaint alleged plaintiff to be permanently and totally disabled by reason of the shrapnel wound in the back, loss of bone structure from the back at the ilium and fracture of the fourth lumbar vertebrae. This was denied by defendant.

On the offer of evidence as to mental and nervous diseases defendant objected, its objection was overruled and exception allowed. [Tr. p. 29.]

The admission of this evidence in an attempt to establish a mental disability, whereas the complaint only set out a physical disability, is one of the points appellant relies on as a cause for granting a new trial.

The other and more important point is that plaintiff failed to establish total disability in that an actual work record even of a part time job, such as was performed in the Soldiers Home, defeats the proof of total disability.

At the close of the testimony defendant moved for a directed verdict, which motion was denied and exception noted. [Tr. p. 63.]

Specification of the Errors Relied Upon.

I.

That the court erred in refusing to direct a verdict for the defendant in that the testimony adduced by the plaintiff on the trial was incompetent and irrelevant and not within the issues to be tried and was insufficient to support a verdict for the plaintiff. [Tr. p. 72.]

The irrelevant and incompetent testimony referred to in this specification of errors is that adduced by the plaintiff through Dr. Orbison. [Tr. pp. 25 to 46, incl.]

This evidence is to the effect that Dr. Orbison is a mental and nervous disease specialist. He testified that he examined the wound on the back of the plaintiff, that he was not a bone specialist, did not have an X-ray picture of the wound, and in fact knew very little about it except what he had been told by the plaintiff. He, however, testified that he believed plaintiff to be totally and permanently disabled because of certain mental and nervous tests and examinations that he gave the plaintiff and that in his opinion these were caused by a disturbance in the spinal cord caused by the concussion of the piece of shrapnel which struck plaintiff in the back. The condition, according to the doctor, which caused total disability was entirely mental and nervous and not physical. The exception of the defendant is as to such evidence of nervous and mental disability whereas the injury alleged in the complaint was the physical injury of a shrapnel wound.

II.

That the court erred in not sustaining defendant's objection to the introduction of testimony which was imma-

terial and irrelevant and not within the issues to be tried. [Tr. p. 73.]

This specification of error refers to the same evidence set out under specification number I.

III.

That the court erred in not sustaining defendant's objection to incompetent and irrelevant testimony and not within the issues to be tried in that by the court's ruling, plaintiff was permitted to submit testimony at variance with the allegations of his complaint. [Tr. p. 73.]

This specification of error refers to the same evidence set out under specification number I.

IV.

That the court erred in not sustaining defendant's objection to the introduction of incompetent and irrelevant testimony and not within the issues to be tried in that the defendant was taken by surprise and was not prepared to submit testimony in rebuttal thereto. [Tr. p. 73.]

This specification of error refers to the same evidence set out under specification number I.

V.

That the court erred in denying the motion of defendant for a directed verdict for the defendant on the ground that the preponderance of evidence failed to show a permanent and total disability of the plaintiff. [Tr. p. 73.]

This specification is based on the fact that the evidence is undisputed that plaintiff had actually worked at a substantially gainful occupation almost continuously since October 8, 1924, a period of about eight years.

VI.

That the court erred in denying the motion of the defendant for a directed verdict in favor of the defendant on the ground that the plaintiff had not sustained the burden of proof and established facts which would justify a judgment being returned in his favor. [Tr. p. 73.]

This specification is based on the same evidence set out under specification number V.

VII.

That the court erred in denying the motion of the defendant for a directed verdict in that the proof adduced by the plaintiff did not prove or tend to establish the cause of action set out in plaintiff's complaint. [Tr. p. 73.]

This specification is based on the same evidence set out under specification number V.

VIII.

That the court erred in denying the motion of defendant for a directed verdict in that the evidence adduced clearly showed that the plaintiff herein was not permanently and totally disabled from following continuously any substantially gainful occupation while the policy of war risk insurance sued upon was in force and effect, but said evidence by a preponderance thereof clearly showed that the plaintiff's disabilities were not total. [Tr. p. 74.]

This specification is based on the same evidence set out under specification number V.

IX.

That errors of law occurred in the trial of said cause in that the verdict was contrary to law. [Tr. p. 74.]

ARGUMENT.

As will be noted in the assignments of error, they are naturally grouped in two propositions. The first four assignments of error refer to the fact that plaintiff was allowed to prove a mental disability whereas his complaint only alleged a physical injury. The second group, assignments of error V to IX, inclusive, is based on the fact that the evidence, including that claimed to have been admitted improperly, did not establish a total and permanent disability in the plaintiff. The first group will be argued first and treated together as one proposition.

Plaintiff's Complaint Alleged Total Physical Disability Whereas Proof Did Not Tend to Establish a Total Disability Except Doctors Testimony That Plaintiff Was Totally Disabled Because of His Nervous Condition.

Plaintiff's complaint alleged that plaintiff received, while in the American Army, certain disabilities, to-wit: "Gunshot wound in left wrist, shrapnel wound in lumbar region of back, loss of bone structure from back at the ilium, fracture of the fourth lumbar vertebrae." [Tr. p. 4.] He then alleges "That by reason of the foregoing plaintiff was discharged, as aforesaid, totally and permanently disabled from gunshot wound in left wrist, shrapnel wound in lumbar region of back, loss of bone structure from back at the ilium, and fracture of the fourth lumbar vertebrae, * * *."

Plaintiff established such injuries and a rating by the Veterans' Bureau of a disability of 30%. [Tr. p. 18.] Plaintiff made no pretext of establishing material physi-

cal injury except the loss of muscles of the back, resulting in a weakening of such parts of the body. Plaintiff claimed to have had pains in his shoulders and the back of his head at all times and that he formerly used a brace to hold up his body but had dispensed with it. [Tr. pp. 20 and 21.]

Plaintiff offered no medical or expert testimony of any kind whatever that the physical injuries caused by any of the wounds received resulted in a total disability. In fact it was obvious from the evidence that the back injury was the only one material and, while permanent, was in no wise in itself total. Plaintiff then, in an effort to establish total disability, relied on Dr. Orbison, a specialist in mental and nervous diseases. [Tr. pp. 25 to 46, incl.]

Appellant claims this testimony was improperly admitted because:

First: It was not within the issues;

Second: It was a surprise to the appellant, which it was not prepared to try.

Pleadings Allege a Physical Disability Only.

Obviously medical testimony prepared by the defendant to meet a claim of physical disability is entirely different and distinct from what would be prepared to meet a claim of mental disability. Plaintiff claims that an examination by a Government doctor showed that plaintiff complained of symptoms which would show a mental and nervous disability. I can find nothing that would justify such conclusion, but, even though it were so, it is submitted that such complaint to a Government doctor years

before the trial of the action would not support and take the place of a complaint alleging such disability. As a matter of fact it would tend to establish the opposite conclusion. If plaintiff had had a mental and nervous complaint and placed such claim before the Bureau and had then brought action and failed to set out such complaint, the reasonable conclusion to be drawn from such pleadings was that such claim had been abandoned and would not be urged on the trial of the action, thus the defendant is entitled to rely on such pleadings and to prepare its defense in accordance therewith. The only proper issues on which evidence should be received and submitted to the jury are those issues created by the pleadings.

> *Slocum v. New York Life Insurance Co.,* 228 U. S. 364, 33 Sup. Ct. Rep. 523.
>
> "* * * The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed and whether it be ample or meagre. * * *."
>
> *Tucker v. United States,* 151 U. S. 164, 14 Sup. Ct. Rep. 229.
>
> "Pleadings are the allegations made by the parties to a civil or criminal case, for the purpose of definitely presenting the issue to be tried and determined between them."
>
> *The Divine Pastora,* 4 Wheat. 52.
>
> "Evidence varying from the facts alleged cannot be introduced."

The pleadings having put only the physical disability in issue, it was not proper to allow a mental or nervous disability to be established in order to sustain the complaint.

Garrett v. Louisville & Nashville R. R. Co., 235 U. S. 308. 35 Sup. Ct. Rep.

"Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point so that the parties may come prepared with their evidence and not be taken by surprise and the jury may not be misled by the introduction of various matters."

A judgment entered on an issue not within the pleadings is improper. The only total disability attempted to be proven for the plaintiff in this case was mental and nervous disability which was not made an issue by the pleadings. Judgment was therefore erroneous.

Reynolds v. Stockton, 140 U. S. 265, 268, 270. 11 Sup. Ct. Rep. 773.

"A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. * * *

"* * * In the case of Smith v. Ontario, 18 Blatchford, 454, 457, Circuit Judge Wallace observed, that 'the matter in issue' has been defined in a case of leading authority, as 'that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading.' King v. Chase, 15 N. H. 9. (41 Amer. Dec. 675.) But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings."

It follows that in the present case not only was improper evidence received but that an improper judgment was rendered for certainly a mental and nervous total and permanent disability was a different issue than the physical disability set out in plaintiff's complaint.

The Evidence Shows Without Dispute That Plaintiff Has Worked for a Long Period of Time and Was at the Time of the Trial Still Employed in a Substantially Gainful Occupation. The Law Is Well Established That Actual Occupation Is a Defense to a Claim of Total and Permanent Disability.

The evidence is not disputed that the plaintiff was employed at the Soldiers Home, Sawtelle, California, beginning on October 8, 1924, as a janitor. He worked in that position until December 7, 1924, a period of two months. He was again employed on August 1, 1925, until November 30, 1925, a period of four months. He was next employed January 24, 1927, to March 31, 1927, as a janitor, a period of two months, at which time he was promoted to company sergeant, in which position he remained until July 15, 1927, a period of three and one-half months. He was again employed as a janitor on September 1, 1927, and worked continuously until October 31, 1930, approximately three years, two months. He was then off for twenty-six days, returning to work on November 26, 1930. At the time of the trial, he was still employed in the same position. During this period, he was working as a sergeant. His pay as a janitor in 1924 was at the rate of $25.00 a month. When he returned to the Home in 1927, he started at $24.00 a month and when he was promoted to sergeant, he was

increased to $28.00 per month. When he next returned to the Home as a janitor, it was at the rate of $24.00 a month until March 1, 1929, when he was raised to $35.00 per month, at which rate it continued until November 26, 1930, when it was raised to $40.00 per month, which compensation he was still receiving at the time of the trial. Such compensation was, of course, in addition to the room and board furnished him as an inmate of the Soldiers Home. [Tr. pp. 61 and 62.]

It is submitted that a man who can work over so long a period and do his work in such a satisfactory manner as to have his compensation increased and be promoted to a more important position, is not in the contemplation of the War Risk Insurance Act totally disabled. This is further illustrated by the testimony of Captain Newcomb, quartermaster at the Soldiers Home at Sawtelle, who testified on cross-examination, that they tried to pick the better type of men to appoint to the position of sergeant. It seems too obvious to need to be stated that a man able to do the work and occupy the position of sergeant, who was the "better type of man," is totally disabled. There is no dispute in the case that the man is partially disabled from the loss of considerable muscle tissue from his back, and cannot do heavy work and, in fact, is rated as 30% disabled by the Veterans' Bureau. That this percentage of disability is permanent is not disputed. It is obvious that the muscle will not again develop or get strong enough to take the place of that which has been lost. It is just as obvious that such physical handicap is not a total disability within the meaning of the War Risk Insurance Act for there are many ordinary occu-

pations which a man without a strong back can perform. That plaintiff recognized this is shown by his belated effort to make the plaintiff's mental and nervous condition an issue in the trial. This is borne out by the fact that the only medical testimony was that of Dr. Thomas J. Orbison who qualified as a specialist in mental and nervous diseases. His testimony was too verbose and uncertain to attempt to make a concise statement of it. However, what he apparently attempted to say was that the concussion caused by the shrapnel which struck the plaintiff caused some disturbance in the spinal cord which resulted in the nervous and mental total disability of the plaintiff. He testified on cross-examination that he did not take any X-rays or had not seen any and that he had never seen the plaintiff except on July 2, 1931, shortly before the trial. [Tr. pp. 29 and 34.]

The doctor's ultimate conclusion is that he on the examination of the plaintiff, conducted certain tests which showed the plaintiff to be nervous. [Tr. pp. 25-46 incl.]

While defendant does not believe that the doctor's testimony is sufficiently definite and certain to establish that plaintiff is totally and permanently disabled even because of a nervous and mental condition or otherwise, it rests its position principally on the fact that the plaintiff, by the work record heretofore set out, is as a matter of law precluded from claiming total and permanent disability from the date claimed, that is, October 22, 1918, [Tr. p. 4], or while his War Risk insurance policy was in force and effect, up to and including July 1, 1919, on which date said policy lapsed. [Tr. p. 7.] That a work record

is a defense to total and permanent disability in such a case as the present one is well established by the following cases:

United States v. Seattle Title Trust Company, 53 Fed. (2d) 435, 437 (C. C. A. 9).

"In this case the fact is that he did work and there is no testimony to justify the conclusion that he was not able to work, that is, that he was not able to do what he did in fact do.

"* * * In the case at bar the evidence was insufficient to justify the verdict of the jury that appellee was totally and permanently disabled on or before February 28, 1919, and in so holding we again call attention to the distinction between a case involving syphilis, such as the case at bar, where ordinary physical work not involving mental strain is rather beneficial than otherwise to the person having such disease, and one in which the insured is suffering from a disease such as active tuberculosis, and wherein it is shown, although work is actually done, that it should not have been done by reason of the effect upon the health of the person so afflicted."

It will be noted that Dr. Orbison admitted on cross-examination that light work might be beneficial to the plaintiff and "that he ought to do just as much as he can physically." [Tr. pp. 38 and 39.]

United States v. John Bela Martin, 54 Fed. (2d) 554, 555-6 (C. C. A. 5).

"The court put the recovery there upon the ground that though he did work, the jury had a right to find he was not able to work, and that it was his working when he was totally disabled which short-

ened his life and brought about his death. If Martin had shown either that he had worked though he was really not able to work, or that though able to work he had worked at the sacrifice of his health, we should not have felt warranted in disturbing the jury's verdict. His evidence established quite the contrary. It does indeed show that he received a serious wound under circumstances highly creditable to him, and that he has a marked disability. That this quite seriously, in fact almost totally disabled him in 1918 when he received it, but that the disability rapidly lessened and from the time of his discharge, with slight intermission, he has gone about his work earning a living as a real estate operator, building contractor, and a trader in lands and leases. * * * His own evidence and that of his witnesses is that while the strength of his leg is impaired, and it is not as serviceable as the uninjured one, he could and did get about with the aid of a cane and by the use of an automobile sufficiently to carry on his business; that he can walk without a cane, and that in fact he does get about now mostly without a cane. He testified that though for a while after the injury the wound on his thigh would suppurate and burst, that it has not done so for a long time and that he has not consulted a doctor on account of it for five years. * * * The medical testimony, his own and that of the Government, was to the effect that his leg has permanently healed with a good union, and that while it will not get any better, it will not get any worse, and that the use of it will not injure it in any way except to cause fatigue.

Judgment for plaintiff reversed."

The present case is similar to this in that there is no claim that the physical injury will get any worse.

United States v. Fly, 58 Fed. (2d) 217, 219 (C. C. A. 8).

"It is quite evident that appellee has been and is under a conisderable handicap because of his condition brought about by his injuries and is suffering a decided disability which may be permanent. But how can this court say that such disability is total—to the extent that it prevents him from 'following continuously any substantially gainful occupation'—when the undisputed evidence of the appellee, his wife and his employer agree that he was at the time of the trial and for eighteen months had been steadily employed at normal wages and had, in the words of his employer, 'performed his work, there with me satisfactorily,' with absences of only about a week, caused by sickness? The evident injury to appellee and the highly meritorious service origin of this injury have inclined us to view this record with lively sympathy but our duty is to take the evidence as we find it and to enforce the rights of these parties as defined by their contract. That contract required total injury before recovery could be lawfully had. This evidence clearly and unmistakably shows no such total injury. The motion for an instructed verdict should have been sustained."

Unglaub v. United States, 57 Fed. (2d) 650, 652 C. C. A. 7).

"In 1927 he was appointed postmaster for the Home, and in this capacity has served ever since, receiving a salary of $900 per year. It was testified that at times he had more or less of volunteer help from others there in taking care of the mail, but in his four years in this capacity he has mainly done the work; and while it is claimed his want of education narrows his opportunity for lighter service,

his evidently satisfactory service as postmaster indicates a considerable degree of intelligence, as well as adaptability. At any rate, with this record of service, how can it be said that he is totally disabled?"

Instructed verdict for defendant affirmed.

Nalbantian v. United States, 54 Fed. (2d) 63 (C. C. A. 7);

United States v. Perry, 55 Fed. (2d) 819 (C. C. A. 8);

United States v. McLaughlin, 53 Fed. (2d) 450 (C. C. A. 8);

United States v. Crume, 54 Fed. (2d) 556, (C. C. A. 5);

United States v. McGill, 56 Fed. (2d) 522, (C. C. A. 8).

Conclusion.

Plaintiff filed a complaint alleging total and permanent physical disability. Obviously, and for all practical purposes, he admitted that it was not proven. He then in attempting to build up his case after such failure, attempted to establish a nervous total disability. This was without warning to the defendant and the Government submits that if such evidence is to be introduced, it should have an opportunity to rebut. It further submits that a judgment rendered on such evidence and not within the issues established by the pleadings, is erroneous and requests that a new trial be granted.

In addition to this, and giving full weight to the evidence, defendant claims to have been introduced erroneously, plaintiff still failed to establish a total dis-

ability. The law is well established that if a plaintiff is able to work that he is not totally and permanently disabled. And it is undisputed in this case that plaintiff did work at a substantially gainful occupation over a long period of time.

Wherefore, defendant requests that the judgment be reversed and a new trial ordered.

Respectfully submitted,

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